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In the Supreme Court of the United States

October Term 1979

RUSSELL J. BEHLING and BEHLING'S TRANSFER, INC.,

Petitioners,

vs.

ROBERT E. SCHMIDT, JR., RICHARD M. EVANS and ROBERT L. SABOW, d/b/a BROWN DEER DEVELOPMENT COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

Petitioner prays that a writ of certiorari issue to review the order of the Supreme Court for the State of Wisconsin entered on April 1, 1980.

OPINION BELOW

The opinion of the Supreme Court for the State of Wisconsin was filed on April 1, 1980 and is set forth in the appendix, pp. App. 1-20. The Supreme Court's denial of petitioners' Motion for Reconsideration was ordered on May 1, 1980 and is set forth in the Appendix, p. App. 21.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1241(1).

QUESTIONS PRESENTED FOR REVIEW

1. Was it error for the Court to deny petitioner trial by jury?

2. Is the Wisconsin Supreme Court's failure to publish its opinion a denial of petitioner's right to due process?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

In June of 1974 Brown Deer Development Company through its co-partner owners Robert E. Schmidt, Jr., Richard M. Evans and Robert L. Sabow entered an agreement with Russell J. Behling represented by documents designated a Lease, Addendum to Lease Agreement and Option to Purchase, modified by a document designated Agreement dated November 21, 1974 executed on behalf of Trebor Development Corporation and Brown Deer Development Company by Messrs. Schmidt, Sabow and Evans and on behalf of Behling's Transfer, Inc. by Russell J. Behling and Kathleen R. Behling. These documents were part of a transaction relating to real property at 5400 West Brown Deer Road, Brown Deer, Wisconsin upon which was to be constructed a building which would house the business of Behling's Transfer, Inc. Financing for the construction of the building was obtained by the respondent Brown Deer Development Company by the execution of a mortgage to Bankers Life of Des Moines, Iowa. The documents representing the agreements between the parties were furnished

to the mortgagee, Bankers Life, to obtain the loan commitment. Subsequently a warehouse building was built upon the property and the appellant took occupancy of the premises.

By summons and complaint dated September 27, 1976 the plaintiffs-respondents, Brown Deer Development Company, a joint venture among Robert E. Schmidt, Jr., Richard M. Evans and Robert L. Sabow purported to commence an action in the Civil Division, Small Claims Branch of the County Court of Milwaukee County alleging by nonverified Complaint that the petitioner Russell J. Behling had failed to comply with the terms and provisions of the lease as amended by failing to pay rent and tax escrow, improvement costs per addendum to lease, interest on delinquent taxes, liens filed by contractors and sprinkler system for a total default of $193,988.72. (Rec. pp. 1-8, A-Ap. pp. 114-119) The complaint further alleged that a notice of default had been served in accordance with the terms of the lease on September 15, 1976. A second cause of action in the complaint alleged a claim for damages in the amount of $203,988.72, the damages appearing to be a duplicate claim of the amount delinquent under the lease with the exception of a claim of $10,000 attorneys fees. The addendum clause of the complaint asked for relief consisting of (1) removal of the appellant from the premises and restoration of possession to the respondent and (2) judgment on behalf of the respondent against the appellant in the amount of $203,988.72 together with interest of not less than $7,000. The summons required the appellant to appear in response to the complaint on October 6, 1976 at 9:00 a.m. and designated the nature of the demand as made by an X in the column, Eviction-Commercial (57), and claimed the amount of the damages, if any, demanded to be $203,988.72 plus interest.

On October 6, 1976 proceedings were had before the Hon. Elliot N. Walstead and at those proceedings the respondent appeared by David A. Saichek and the petitioner by Attorney Eli C. Frank. After argument as to jurisdiction the court set October 18, 1976 as the date for answer (Rec. p. 45) and October 20, 1976 at 9:30 a.m. for trial.

The petitioner Behling had requested that Attorney Frank request trial by jury and when he determined that Attorney Frank failed to make such a demand, the petitioner terminated the legal services of Attorney Frank (Rec. pp. 79-80). On October 19, 1976 proceedings were had before the Court at which time respondent was represented by Attorney Saichek and the petitioner by Attorney Norman Skogstad. Attorney Skogstad requested an adjournment of the October 20, 1976 trial date (Rec. pp. 48, 53, 55, 56) and requested trial by jury (Rec. p. 60). The court denied the motions.

On October 20, 1976 proceedings were held before the Court and the respondents appeared by Attorney Saichek and the petitioner by Attorney Robert E. Sutton. Attorney Sutton indicated that he had been retained that very morning by the appellant and requested an adjournment for the purpose of filing responsive pleadings (Rec. p. 68), indicating a desire to plead jurisdictional objections (Rec. pp. 70-75). The motion was denied and the Court held that it would hold the eviction proceedings at that time. (Rec. p. 76). A motion for a trial by jury was made and testimony in support thereof furnished by the petitioner to the effect that he had desired a jury from the commencement of the proceedings and had fired Attorney Frank because of his failure to make such a demand. (Rec. pp. 77-84). The Court denied the motion indicating that the petitioner "... can sue his lawyer for malpractice" (Rec. p. 86). Trial

was then held on October 20, 21 and 25, 1976. At the conclusion of the trial the Court ordered the appellant evicted from the premises. (Rec. pp. 369-375, A-Ap. 110-114) An appeal from the decision of the Court was duly filed with the Circuit Court of Milwaukee County. The Circuit Court affirmed the decision by its memorandum decision of April 20, 1977 and judgment of June 1, 1977. (Rec. pp. 411-438, A-Ap. pp. 101-110) The petitioner filed an appeal from the Circuit Court's decision with the Supreme Court of the State of Wisconsin. The Supreme Court affirmed the decision reached by the Circuit Court on April 1, 1980. On April 21, 1980 petitioner filed a motion for reconsideration and motion and memorandum requesting publication and challenging the filing of the opinion on April 1, 1980 as an unpublished opinion. Petitioner's motions were denied. The petition for writ of certiorari is directed to the order denying reconsideration and the decision of the Supreme Court dated April 1, 1980 on the issue of the right of petitioner to trial by jury. The petition for certiorari is also directed to the Wisconsin Supreme Court's denial of the motion of petitioner requesting publication of the opinion.

REASONS FOR GRANTING THE WRIT

I.

THE COURT ERRED IN REFUSING TO ALLOW TRIAL BY JURY

The right of trial by jury in Wisconsin in a civil action is preserved by Article I, Sec. 5 of the Wisconsin Constitution and the statutes made and provided. Sec. 805.01, Wis. Stats.; *Callanan* v. *Judd,* 23 Wis. 343 (1868); *Millet* v. *Hayford,* 1 Wis. 401 (1853); *Noval* v. *Rice,* 2 Wis. 22 (1853); *Gaston* v. *Babcock,* 6 Wis. 503 (1857).

A party is entitled to a jury trial as a matter of right unless he waives it. *Twentieth Century Co.* v. *Quilling,* 136 Wis. 481, 117 N.W. 1007 (1908).

The evidence in the case at bar is uncontradicted that the appellant desired a jury trial from the outset and in fact fired the first attorney who represented him inter alia because he failed to make the affirmative demand for a jury. It must be noted that that attorney did not waive a jury. The two attorneys who subsequently represented the appellant made demand for a jury on the record.

Under the circumstances the denial of the jury to the petitioner was a clear violation of his rights under the Constitution of Wisconsin and his rights to due process and equal protection under the Constitution of the United States. *Labowe* v. *Balthazor,* 180 Wis. 419, 193 N.W. 244, 32 ALR 862 (1923); *State* v. *Clark,* 67 Wis. 229, 30 N.W. 122 (1886); *State ex rel. Prentice* v. *County Court of Milwaukee County,* 70 Wis. 2d 330, 234 N.W. 2d 283 (1975).

The position of the court that the literal provisions of Sec. 299.21(3) were not met and that the petitioner could

sue his prior lawyer for malpractice should be unavailing as servitude to form over substance. The petitioner respectfully submits that the literal application of Sec. 299.21(3), Wis. Stats. by the Small Claims Court violated the petitioner's rights to due process and equal protection under the Constitution of the United States. The fact that the petitioner requested that his attorney demand a jury trial was prima facie evidence that he was denied due process. An attorney's failure to demand a jury trial according to the letter of Sec. 299.21(3) should not preclude a client's rights to equal protection in a civil action; the fact that the petitioner had the misfortune of not having his desire for a jury trial presented to the court in a manner prescribed by a Wisconsin Statute because of his attorney's misfeasance should not bar him from the rights bestowed by the constitutions of the State of Wisconsin and the United States. The notion that the petitioner "can sue his lawyer for malpractice" (Rec. p. 86) should have no affect on the fact that the petitioner was denied his constitutional rights to a jury trial and due process of law.

In this regard it must be remembered that Sec. 299.21 speaks in terms of "joinder of issue" and, although the Court rushed the trial, it allowed for additional time for the responsive pleadings to be filed. (Rec. p. 76) Although the trial was held on the eviction issue, issue had not been joined and the time for jury demand had not run. It is respectfully submitted, regardless of the determination of whether or not Sec. 299.21(3) had been literally complied with, the circumstances revealed by the record compel a determination that the jury demand of the appellant's counsel made on both October 19 and 20, 1976 should have been accommodated as a matter of constitutional due process.

II.

THE OPINION OF THE WISCONSIN SUPREME COURT SHOULD HAVE BEEN PUBLISHED

Under the criteria for publication of opinions set forth in Rule 809.23, Wis. Stats. for the Court of Appeals—which by implication should apply to opinions filed by the Supreme Court—the opinion with respect to the issues decided in Sections I, II and III enunciates and clarifies new rules of law or at least applies established rules of law to a factual situation significantly different from any found in prior published opinions and contains an interpretation and application of Chapter 299 and Section 704.17, Wis. Stats. which should be of substantial public interest. In addition, the opinion makes a significant distinction concerning a prior decision—*Tower Building Co.* v. *Andrew,* 191 Wis. 269, 210 N.W. 842 (1926). And finally, Section II of the opinion appears to be an initial interpretation of waiver of trial by jury under Chapter 299.

It is respectfully submitted that failure to publish the opinion is a violation of the rights of the defendants under the Fourteenth Amendment to the Constitution of the United States. An essential concomitant of due process of law as it relates to meaningful access to the courts and appeal is a resolution of issues raised in such a manner as to instill confidence of the litigants in the integrity of the legal process. One of the methods of maintaining faith in this integrity is that the decisions reached by the appellate tribunals shall be subject to scrutiny within the process and utilized as precedent in subsequent cases. With the enactment of a rule which prevents such scrutiny and declares an opinion to be of no precedential value a fundamental value served by the appellate process is undermined.

As Justice Black stated *In re Murchison,* 349 U.S. 1 (1955):

> ". . . to perform its high function in the best way justice must satisfy the appearance of justice."

Cf. *Boddie* v. *Connecticut,* 401 U.S. 371 (1971) and *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337 (1969).

The concept of due process is not merely a procedural safeguard, it affords freedom from arbitrary action. It has been said that the protection from arbitrary action is the essence of substantive due process. *Poe* v. *Ullman,* 367 U.S. 497, 6 L.Ed. 2d 989, 81 S.Ct. 1752 (1961) and 16 *Am. Jur. 2d Const. Law,* Chapter 550, pp. 946-949, Chapter 575, p. 980.

It is respectfully submitted that the unpublished opinion by its very nature invites arbitrary action. The general practice and Rule 809.23 should be struck down as unconstitutional on its face and as applied to the instant case.

CONCLUSION

For the foregoing reasons stated above certiorari should be granted and the order of the Wisconsin Supreme Court dated April 1, 1980 should be reversed.

Respectfully submitted,

ROBERT E. SUTTON
Attorney for Petitioner

APPENDIX

APPENDIX A

STATE OF WISCONSIN : IN SUPREME COURT

No. 77-290 (Filed April 1, 1980)

ROBERT E. SCHMIDT, JR., RICHARD M. EVANS and ROBERT L. SAROW, d/b/a BROWN DEER DEVELOPMENT COMPANY,

Plaintiffs-Respondents,

vs.

RUSSELL J. BEHLING and BEHLING'S TRANSFER, INC.,

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Milwaukee county: WILLIAM R. MOSER, Circuit Judge. *Affirmed.*

PER CURIAM. This is an appeal from a circuit court judgment affirming a county court judgment for eviction of the defendants from premises owned by the plaintiffs and used by the defendants as a warehouse.

This action was brought under Chapter 299 of the Statutes,[1] the small claims procedure. The summons and complaint were dated September 27, 1976, received by the sheriff on September 28, 1976, served on September 30 and

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[1] Actions for eviction may be brought under the procedure for small claims type actions "regardless of the amount of rent claimed therein." Sec. 299.01(1), Stats.

See note 4.

October 1, 1976, and filed on October 4, 1976. The "return date," the date on which the defendants were required to appear in court and to plead, was designated as October 6, 1976. Secs. 299.05, 299.20, Stats. A notice to quit or pay rent had been sent to the defendants by certified mail; it had been received on September 15th.

The complaint sought eviction of the tenants and damages in the amount of $203,988.72 plus interest. The damages were for past due rental and tax escrow, for improvement costs pursuant to an addendum to the lease, interest on delinquent taxes, liens filed by contractors hired by tenant, sprinkler system, and attorney's fees. The complaint alleged that the tenants had been under notice of their default since December 30, 1975.

On October 6, 1976 (the return date), Attorney Eli Frank appeared on behalf of the defendants. He objected to the service of the notice because it was addressed to Behling's Transfer, Inc. and not to Russell J. Behling. The court found there was a prima facie case of proper service because the certified mail receipt had been signed by Russell J. Behling.

Defendants' attorney requested the production of documents and challenged the complaint's allegations of damages as being too indefinite and uncertain. Plaintiff's attorney agreed to provide the documents and further information concerning damages. Plaintiffs requested that a trial date be set promptly and stated that they were prepared to proceed on both the eviction and damages, but that the eviction proceeding could be heard first to avoid delay.

Defendants stated that their defense to eviction would be that they had lost money because of plaintiffs' breach of the lease by their improper construction of the building and their failure to complete construction and that the question

of defendants' damages was an issue in the eviction part of the proceeding.

The court noted that normally an eviction proceeding is a summary proceeding and cannot be adjourned without good cause shown. Defendants thought the large amount of money involved and the complexity was good cause to adjourn. The court stated that its initial decision was to treat the eviction part of the proceedings as a summary action, that the parties could be granted additional time to prepare for the damage issue, and that it would be willing to change the proposed procedure as the proceeding developed.[2]

The defendants were granted twelve days to answer (until October 18, 1976), and the trial was set for October 20, 1976.

On October 14th, a stipulation was filed relieving Attorney Frank as the defendants' attorney. No new attorney was named in the stipulation. An answer was not filed on October 18. On October 19, Attorney Norman Skogstad appeared for the defendants. He requested an adjournment, and after hearing testimony and arguments from both attorneys, the court found there was no good cause shown for adjournment and denied the motion. The defendants' attorney orally requested a jury trial.

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[2] Although the county court separated the eviction proceedings from the proceedings to determine damages, the county court did consider evidence during the eviction proceeding relating to defendants' arguments that they were justifiably in default on rent payments.

The county court concluded that the defendants' arguments were without merit for the purposes of the eviction proceeding. The plaintiffs' claim for damages and the defendants' counterclaim are still to be tried.

On October 20, Robert Sutton appeared as the defendants' attorney. Sutton requested additional time to file an answer and requested a jury trial. The defendant testified that one of the reasons he had fired Attorney Frank was because he had not requested a jury trial.

The court decided that the eviction proceeding would be held as planned and that the consideration of the exact amount owing would be held on a later date, with time for the defendants to file an answer as to the issue of damages. The request for a jury trial was denied, because it was not filed at or before the time of joinder of issue as required by sec. 299.21(3), Stats. The court found that time for joinder of issue had been October 18, 1976, the date the answer had been due on the issue of eviction. The court found that other conditions of sec. 299.21(3), Stats., for requesting trial by jury had not been met: payment of fees and written demand for trial by jury.

The trial proceeded as scheduled on October 20th. Plaintiffs introduced a lease dated June 20, 1974, and an additional agreement executed December 30, 1974. Plaintiffs described the lease as a "triple net lease," an arrangement by which the developer-owner builds a property for use by the tenant and leases it to the tenant; and testified that there was an arrearage in the rent due; that additional amounts were due under the additional agreement; that there was a lien on the premises for asphalt paving for a parking lot; and that because of building code violations, plaintiffs had been required to install a sprinkler system. Plaintiffs claimed that defendants were responsible for payment for the sprinkler system and for the asphalt paving.

Although the exact amount owing was not an issue in the eviction part of the trial, the court stated that questions concerning which party was responsible for paying for an item and the approximate cost of the item was relevant

because the defendants might show that if they were in default on the lease, the default was justifiable and they should not be evicted.

The defendant Russell Behling testified that he thought that his obligations under the lease were contingent upon proper construction of the building. The defendant testified that the ordinances for the Village of Brown Deer had required a sprinkler system as a fire precaution (unlike the state's requirements) and that the Village had limited his occupancy to about 25 percent of the building, which had reduced his monthly income. The plaintiffs had expected him to finance the sprinkler system and he had attempted to obtain a variance from the ordinance. He could not finance a sprinkler system and so the plaintiffs installed it. He testified that a significant portion of the building was not usable because of moisture and dampness problems. The warehouse was designed to be unheated, and the defendant had planned to store furniture and other items in it. Behling testified that the plaintiffs had tried to remedy the moisture problem by putting a coating on the outside of the building, but that it did not solve the problem. The plaintiffs testified that they had had the outside of the building recoated because they were not satisfied with the initial coating of the blocks.

The fire chief for the Village of Brown Deer (called by the plaintiffs) testified that he had told Behling that it was illegal for him to occupy any part of the building. He testified that he had seen about 75 percent of the building occupied and that his subordinates had reported 90 percent.

Defendants relied on the testimony of an architect who stated that he had visited the building, that the building had a moisture problem, and that the walls and floors were wet from moisture entering through the roof and

walls. The architect had not examined the roof and did not know if the water problem had existed during the first year.

A consulting engineer testified that he had conducted moisture tests of the walls and had found the moisture to range from 15 to over 50 percent; he had not conducted moisture tests of the air in the building. He stated that he had seen water stains on the walls; that he had examined the roof and found "open joints in the flashing, both the metal flashing and the fabric flashing;" and thought that "water penetration through the openings in the flashing" was "the major cause" of the moisture problem in the building.

The plaintiffs' witness, a roofing contractor from Cudahy Roofing, the roofing company which had installed the roof about two and a half years earlier, testified that he had examined the roof that morning and that there "might have been a pulling on the flashing with ripples" which would have been normal expansion and contraction of the building, but that there were no tears or breaks in the flashing. He stated that he did find that a closure plate which fits over the seam in the metal coping had been "pried, or some blasted thing" and that he "tried to put it back together and [he] didn't have a plyers so [he] couldn't close it." He explained that between the pieces of metal coping a space is left for expansion and that a closure plate is placed over the seam. He stated that the defendants' witnesses had incorrectly called the metal coping a metal flashing. He identified one of the photographs which had been introduced by the defendants as a photograph of this closure plate. He stated that the roof would not leak due to this closure plate being lifted, because the flashing is under the metal coping and that even if the roof was flooded or there was a hard rain, the water would

not leak through. He had found that there was some settling in the building, but that no water would enter at the place it had settled. He testified that he had inspected the interior of the building, found the walls and floor dry and found cobwebs, which would indicate it had been dry. He further testified that about a month earlier he had received a call from the plaintiffs to check the building for leaks and his superintendent had gone to check it. He also testified that his company had had a two-year guarantee on the roof, which time had passed.

The plaintiffs introduced the testimony of a merchandise manager for an interior designer who stated that he was familiar with wood furniture and with fabrics and with their storage in warehouses which are unheated. He testified that it is good for furniture to be stored where there is some humidity in the air and where it is not too dry. He stated that relative humidity in the air ranging from 15 to 50 percent would not be too wet for the storage of furniture.

Mr. Robert Williams, Jr., a professional engineer who specialized in the field of architectural and building construction engineering, also testified for the plaintiffs. He had designed buildings for one of plaintiffs' companies since about 1973, and he had periodically visited the job site while the warehouse in question was being built. He testified that he had inspected the warehouse that morning looking for leaks. He inspected the interior and exterior of the building and had not found any water present that day. He looked for evidence of water having been present in the past. In one corner of the building in the mezzanine level he did notice some streaking of the die which had been put on the walls and saw some streaking of dust on the floor. On the story above the mezzanine level, he checked the ceiling to look for streaking of dye up close to the roof area. He did not find any other evi-

dence of prior water problems on the building. He testified that the building would not suffer water damage in a hard rain storm. He stated that in his opinion water had not entered through the roof, but had been put on the wall from a source such as a hose or bucket. He testified that the photographs that had been introduced by defendants' witnesses were of the mezzanine area and that the water depicted on the walls was not due to natural weather elements, but was a result of artificially placing the water there by some human process. He testified that by visual inspection of the walls, he believed the moisture content was below 25 percent; that by natural causes it would seem impossible to read 50 percent; but that such a level or higher could be artificially induced.

He was questioned about the horizontal line of efflorescence on the wall[3] which appeared in some of the pictures

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[3] Mr. Williams defined efflorescence as:

"A. Effervescence [sic] is a chemical reaction of water in the alkaline materials in the mortar; and, when the water from the outside air reaches the alkaline, speckles through the mortar leeches through the walls. This can be compounded with different acidic cleaning solutions that—acid would further desolve the effervescence [sic] and leech out through the mortar.

"Q. And effervescence [sic] makes a mark on the block of the concrete; is that it?

"A. It appears as the salty looking substance on the block, correct.

"Q. And that's caused by moisture condensation; is that right?

"A. Not caused from moisture condensation, no.

"Q. What causes it?

"A. By water actually raining on the outside, or during the washing of the block when the water hits the block. It's not formed by condensation.

"Q. It's caused by water?

"A. That's correct."

introduced by defendants. He explained that the contractor had

> "stopped construction at that point because of cold weather; and this was laid down and protected from freezing. Construction was restarted at that point. . . .
>
> "The reason the effervescence (sic) is here is when they started construction again they had to clean the dirt and accumulation. They wet the top of the block down before they started construction; and effervescence (sic) is accelerated in winter construction by salts they add to the mortar to increase the acceleration of the setting time; so it sets faster and doesn't have to be protected; and that is evidently what caused that. They washed the mortar that was fresh. It had excess salts and the construction is shown all the way across. Normal effervescence (sic) would not appear in a horizontal line. This was due to a breaking in the construction. It was caused by water, but the effervescence (sic) has been there, probably, in excess of a year and a half or two years, and that didn't occur at any time last year."

He testified that other smaller lines of efflorescence had been caused by washing the wall. He stated that currently there was not excessive moisture in the building which would damage furniture and that he did not see any evidence that there had previously been excessive moisture in the warehouse caused by natural elements.

One of the plaintiffs who had been a field supervisor at construction testified that in his opinion the water shown in the photographs which had been introduced by defendants was artificially induced. He agreed with Mr. Williams' testimony that the horizontal line of efflorescence originated during construction. He stated that when he was in the building about a month earlier he had observed that all of the building was dry except for a water spot of about one foot in diameter in the center of the roof

in the mezzanine area. He had contacted Cudahy Roofing and asked them to check it. After checking it, Cudahy Roofing reported that it was not a roof leak, but it was apparently condensation. He stated that the defendant Behling had never told him about any water problems and that he had never heard Behling mention a water problem before Behling's testimony in court during this trial.

The defendant Behling was called to testify again and stated that he had never artificially induced water onto the walls. He stated that at about the time the construction was completed, one of the plaintiffs had induced water onto the wall to try to clean it. He testified that in the action brought by the Village of Brown Deer for illegal occupancy of the building, the municipal judge informed him that he could temporarily occupy 25 percent of the warehouse space and that he would have to have a sprinkler system in one section and smoke devices in another part. He testified that it was "an absolute lie" that the water shown in the photographs was "the result of someone sprinkling that water with a hose."

A representative of Imperial Van Lines was called as a witness by the defendants. He testified that he had considered leasing part of the warehouse for storage of goods about a year earlier and that he had "turn[ed] it down" because it had water marks and that the walls felt damp. He stated that he had not contracted with any other storage facility in the Milwaukee area; that his closest facility was in Waukegan, Illinois.

At the defendants' request the court inspected the premises on October 21, 1976 with the court reporter and representatives of the plaintiffs and defendants.

On October 25, 1976, after hearing final arguments, the court announced its decision. The court found that the agreement between the parties was a twenty-five year lease

and that leases in commercial transactions commonly include provisions relating to construction costs, taxes, payment of utilities and other matters. The court found that the lease provided for ten days' notice and that the notice provision was valid under sec. 704.17(3) and (5), Stats.

The court found that the plaintiffs did not install a sprinkler system earlier at the request of the defendants and that therefore the defendants could not argue that they were relieved of their obligation to pay rent by the plaintiffs' failure to install the system.

The court next addressed defendants' allegation that the defendants were not required to pay rent because the building was unsuitable for the storage of goods. The court summarized its on-site inspection of the building, noting that it was a layman: the building was dry when the court visited; there was no indication that the piles of cardboard leaning against walls had ever been wet; it appeared to be a well-constructed building. The court recognized that there had been conflicting expert testimony during the trial. The court stated that it did not believe that Imperial Van Lines had intended to use this warehouse and had needed a warehouse in the Milwaukee area, because the company had not chosen another warehouse in the Milwaukee area. The court found that moisture on the walls shown in the photographs had been artificially induced and did not represent the true character of the building.

The court found that rent and other payments were in default and found that the plaintiffs were entitled to a judgment of eviction. The court set a date for the defendants to submit an answer concerning the amount of damages claimed and noted that a date would be set for trial on that issue.

On appeal to the circuit court, the judgment of eviction by the county court was affirmed by memorandum decision dated April 20, 1977 and judgment dated June 1, 1977.

On appeal to this court the defendants raise four issues.

I.

First, defendants argue that the county court did not have jurisdiction of this case under chapter 299, Stats., because of the amount of damages claimed and because the relationship between the parties was allegedly more complex than landlord and tenant. Defendants' argument that because plaintiffs claimed a large amount of damages they could not bring the action under chap. 299 has no merit. Sec. 299.01(1), Stats. 1975, provides that actions for eviction may be brought in county court under the procedure for small claims type actions "regardless of the amount of rent claimed therein."[4] Sec. 299.40, Stats. allows the plaintiffs to "join with [their] claim for restitution of the premises any other claim against the defendant arising out of his possession or occupancy of the premises."[5]

In attacking the lower court's finding that the agreement between the parties was a lease, the defendants do not

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[4] Sec. 299.01 (intro.) and (1), Stats. 1975, provides:

"299.01 Applicability of chapter. Subject to the limitations ot ss. 299.11 and 299.12, the procedure in this chapter shall be used in county court in the following actions:

"(1) EVICTION ACTIONS. Actions for eviction as defined in s. 299.40 regardless of the amount of rent claimed therein."

[5] Sec. 299.40, Stats., provides:

"299.40 Eviction actions. (1) WHEN COMMENCED. A civil action of eviction may be commenced by a person entitled to the possession of real property to remove therefrom any person who is not entitled to either the possession or occupancy of such real property.

"(2) JOINDER OF OTHER CLAIMS. The plaintiff may join with his claim for restitution of the premises any other claim against the defendant arising out of his possession or occupancy of the premises.

"(3) EXCEPTION. Nothing in this section shall affect ss. 704.09(4) and 704.19."

refer to any evidence in the record to support their assertions that the relationship was other than that of landlord-tenant.[6]

II.

Second, the defendants argue that they and their attorneys did not waive trial by jury and that under the circumstances the denial of trial by jury violated the Wisconsin Constitution and the due process and equal protection provisions of the United States Constitution.

Section 299.21(3)(a), Stats., provides that in order to obtain a jury trial in an eviction action, the party requesting a jury trial pay certain fees and file a written demand for trial by jury. Otherwise "the right to jury is waived forever." In eviction actions, the demand must be filed at or before the time of joinder of issue.[7]

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[6] The defendants refer to an option to purchase which is printed in their appendix but which is not contained in the record. Defendant has given no reason for this court to take judicial notice of the document on appeal and this court does not take judicial notice of it.

[7] The full text of sec. 299.21, Stats. 1975, provides:

299.21 **Trial.** (1) DETERMINATION OF METHOD OF TRIAL. In the absence of a jury demand, trial shall be to the court.

(2) TRIAL BY COURT. If trial is to the court, the case may, with the consent of all the parties, be tried on the return day.

(3) TRIAL BY JURY. (a) Any party may, upon payment of the fees specified in par. (b), file a written demand for trial by jury. If no party demands a trial by jury, the right to trial by jury is waived forever. In eviction actions, such demand shall be filed at or before the time of joinder of issue; in all other actions within 20 days thereafter.

(b) The fee for a jury is $24, plus an additional amount as suit tax which will result in a suit tax payment of the amount

(footnote continued)

Defendants at no time filed a written demand for trial by jury or paid the required fees. With regard to the timing of the demand, the trial judge found that the time for joinder of issue had been extended to October 18, 1976, the date on which the answer had been due on the eviction part of the case.[8]

In eviction actions, the answer is not required to be in writing, unless plaintiff's title is put in issue. Sec. 299.43, Stats. In this case the defendants were given an opportunity to file a written answer. The defendants failed to do so and their failure to respond was treated as a denial of all the allegations of the complaint. Defendants made their first oral request for jury trial on October 19, 1976, after the court had refused their requests for adjournment. Defendants argue that the time for joinder of issues was postponed on October 20, 1976, when the court allowed additional time to file an answer. This argument ignores the fact that the court restricted the later answer to the question of the amounts owing, which was not to be deter-

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(footnote continued)

which would have been payable had the action been commenced in circuit court and additional clerk's fee of $6.

(4) JURY PROCEDURE. If there is a demand for a trial by jury, the parties shall proceed as if the action had originally been begun as a proceeding under Title XLIIA; the plaintiff shall, when no complaint has previously been served and filed, accordingly file and serve a written complaint within 20 days of the jury demand, and the court shall place the case on the trial calendar of the county court or forthwith transfer the case to circuit court for trial.

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[8] The date for joinder of issue would be the return date of the summons, unless the date is adjourned. *See* Secs. 299.20 and 299.27, Stats., and Boden, *1971 Revision of Eviction Practice in Wisconsin*, 54 Marq. L.R. 298, 305 (1971).

mined in the eviction part of the trial but in the second part of the trial.

Nevertheless, defendants argue violation of their right under art. I, sec. 5 of the Wisconsin Constitution:

> "The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law. . . ."

The constitution expressly provides that the right to jury trial in civil cases may be waived in the manner prescribed by law. Sec. 299.21(3), Stats., is a law which prescribes that failure of a party to act constitutes a waiver of jury trial in cases to which ch. 299 applies. This statute has been held constitutional. *State ex rel. Prentice* v. *County Court,* 70 Wis.2d 230, 239, 234 N.W.2d 283 (1975). Defendants did not meet the statutory requirements for requesting a jury trial and therefore waived the right to jury trial. There is nothing in the record to support defendants' assertion that their constitutional right to a jury trial has been violated.

III.

Third, defendants argue that the ten-day notice which they received was not valid under sec. 704.17, Stats., and that they should have received thirty-days' notice.

Sec. 704.17(3), Stats., provides that in leases for more than one year the landlord shall give the tenant at least thirty days' notice requiring him to comply with the lease and that if the tenant fails to comply with the lease within that period the tenancy is terminated. Sec. 704.17(5), Stats., permits leases for more than one year to contain

contrary provisions regarding termination.[9] The relationship of these two subsections has been summarized as follows in the Drafting Committee's Comment (1969) to sec.

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[9] Relevant portions of secs. 704.17, 704.21 and 704.23, Stats.:

"704.17 Notice terminating tenancies for failure to pay rent or other breach by tenant.

". . .

"(3) LEASE FOR MORE THAN ONE YEAR. If a tenant under a lease for more than one year fails to pay rent when due, or commits waste, or breaches any other covenant or condition of his lease, the tenancy is terminated if the landlord gives the tenant notice requiring him to pay the rent, repair the waste, or otherwise comply with the lease on or before a date at least 30 days after the giving of the notice, and if the tenant fails to comply with the notice. A tenant is deemed to be complying with the notice if promptly upon receipt of such notice he takes reasonable steps to remedy the default and proceeds with reasonable diligence, or if damages are adequate protection for the landlord and the tenant makes a bona fide and reasonable offer to pay the landlord all damages for his breach; but in case of failure to pay rent, all rent due must be paid on or before the date specified in the notice.

"(4) FORM OF NOTICE AND MANNER OF GIVING. Notice must be in writing and given as specified in s. 704.21. If so given, the tenant is not entitled to possession or occupancy of the premises after the date of termination specified in the notice.

"(5) CONTRARY PROVISION IN THE LEASE. Provisions in the lease or rental agreement for termination contrary to this section are invalid except in leases for more than one year."

"704.21 Manner of giving notice. (1) NOTICE BY LANDLORD. Notice by the landlord or a person in his behalf must be given under this chapter by one of the following methods:

"(a) By giving a copy of the notice personally to the tenant or by leaving a copy at his usual place of abode in the presence of some competent member of his family at

(footnote continued)

704.17, printed in 1979 Special Pamphlet West's Wisconsin Statutes Annotated: "Sub. (3) will, therefore, govern only if the lease does not provide otherwise."

Paragraph 12 of the lease provides:

"12. *DEFAULTS:* It is mutually agreed that, in the event Lessee shall default in the payment of rentals when due, Lessor shall forward written notice

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(footnote continued)

least 14 years of age, who is informed of the contents of the notice;

"(b) By leaving a copy with any competent person apparently in charge of the rented premises or occupying the premises or a part thereof, and by mailing a copy by regular or other mail to the tenant's last-known address;

"(c) If notice cannot be given under par. (a) or (b) with reasonable diligence, by affixing a copy of the notice in a conspicuous place on the rented premises where it can be conveniently read and by mailing a copy by regular or other mail to the tenant's last-known address;

"(d) By mailing a copy of the notice by registered or certified mail to the tenant at his last-known address;

"(e) By serving the tenant as prescribed in s. 801.11 for the service of a summons.

". . .

"(3) CORPORATION OR PARTNERSHIP. If notice is to be given to a corporation notice may be given by any method provided in sub. (1) or (2) except that notice under sub. (1) (a) or (2) (a) may be given only to an officer, director, registered agent or managing agent, or left with an employe in the office of such officer or agent during regular business hours. If notice is to be given to a partnership, notice may be given by any method in sub. (1) or (2) except that notice under sub. (1) (a) or (2) (a) may be given only to a general partner or managing agent of the partnership, or left with an employe in the office of such partner or agent during regular business hours, or left at the usual place of abode of a general partner in the presence of

(footnote continued)

of such default by certified mail, return receipt requested, or by personal delivery, addressed to Lessee as hereinafter set forth, and failure on the part of Lessee to cure such default within 10 days after the date of receipt of said notice shall, at the option of Lessor, work a forfeiture of this Lease. In case Lessee so continues the default of any rental payment due after notice, Lessee shall not be released of any liability for rent hereunder by reason of Lessor's repossession of the Premises or by Lessor's taking any other legal proceedings available to it upon such default. Nor shall a forfeiture of this Lease release Lessee from continuing liability for the payment of rent as herein provided. Rentals shall include taxes and insurance premium escrows. If Lessor, by reason of Lessee's late payment is required to pay lender late penalty, Lessee agrees to pay same.

"It is mutually agreed that in the event Lessee shall default in any of the terms and provisions of this Lease other than payment of rent, Lessor shall be required to forward written notice of such default

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(footnote continued)

some competent member of his family at least 14 years of age, who is informed of the contents of the notice.

"(4) NOTICE TO ONE OF SEVERAL PARTIES. If there are 2 or more landlords or 2 or more cotenants of the same premises, notice given to one is deemed to be given to the others also.

"(5) EFFECT OF ACTUAL RECEIPT OF NOTICE. If notice is not properly given by one of the methods specified in this section, but is actually received by the other party, the notice is deemed to be properly given; but the burden is upon the party alleging actual receipt to prove the fact by clear and convincing evidence."

"704.23 Removal of tenant on termination of tenancy. If a tenant remains in possession without consent of his landlord after termination of his tenancy, the landlord may in every case proceed in any manner permitted by law to remove the tenant and recover damages for such holding over."

by registered mail, addressed to Lessee as hereinafter set forth, and Lessee agrees that if it be in default as set forth in such notice, it will cure such default within 20 days after the date of receipt of such notice (or in the event such default is of such a character as to require more than 20 days to cure, Lessee will use due diligence to cure such default). And, in the event Lessee shall fail to cure such default as herein set forth, Lessor may cure such default and the cost and expense thereof shall be deemed to be additional rent to be paid by Lessee on the next day when monthly rental shall become due and collectible.

"Any amounts due Lessor by Lessee not paid when due shall bear interest thereafter at the legal rate.

"If, however, after such notice to Lessee of a default and an opportunity to cure the same, Lessee shall refuse to cure or make good any such default, Lessor may, at its option, terminate this Lease."

The county court and the circuit court found that the lease provision for ten-day notice governed and was valid under sec. 704.17(5).

The defendants cite *Tower Building Co.* v. *Andrew,* 191 Wis. 269, 210 N.W. 842 (1926), for their argument that in order to reduce the amount of notice needed, paragraph 12 of the lease would have had to use the word "eviction" and that "the notice given by the lessor that the lease was by its terms forfeited and terminated was effective for only that purpose; however, for the lessor to invoke an action in unlawful detainer against the appellant he must comply with the notice provisions of sec. 704.17(3)—30 days notice." We do not accept this line of reasoning.

Sec. 704.17(3) and (5) use the word "termination," not "eviction," and defendants' argument admits that the ten-day notice was effective for terminating the lease. More importantly, unlike the situation in *Tower Building*

Co. v. *Andrew,* in which the landlord did not abide by the notice requirements of the unlawful detainer statute, in the present case the plaintiffs gave notice pursuant to the lease provision as authorized by sec. 704.17(3) and (5), Stats.

IV.

Fourth, defendants argue that the county court erred in its resolution of the issue of credibility concerning the "critical fact" of whether the building had been defective due to moisture accumulation which prevented appellants from using the warehouse.

The county court found that the building did not have a problem of excess moisture caused by natural elements and that the moisture on the walls shown in the photographs had been artificially induced.

On appeal, the trial court's findings of fact will not be upset unless they are against the great weight and clear preponderance of the evidence. In order for this court to reverse the trial court, the evidence contrary to the finding must constitute the great weight and clear preponderance of the evidence. *Mitchell* v. *Western Casualty & Surety Co.,* 30 Wis.2d 419, 421, 141 N.W.2d 212 (1966).

On review of the evidence, which has been previously summarized in this opinion, we cannot conclude that the county court's findings were against the great weight and clear preponderance of the evidence. The judgment of the circuit court which affirmed the county court is therefore affirmed.

APPENDIX B

Office of the Clerk

SUPREME COURT

State of Wisconsin

Madison, May 13, 1980

To David A. Saichek
Gaines & Saichek
161 W. Wisconsin Avenue
Milwaukee, WI 53203

Robert E. Sutton
1409 E. Capitol Drive
Milwaukee, WI 53211

The Court today announced an order in your case as follows:

#77-290 *Robert T. Schmidt, Jr., et al* v. *Russell J. Behling, et al*

Motion for reconsideration denied with costs.

Marilyn L. Graves
Clerk of Supreme Court.

APPENDIX C

STATE OF WISCONSIN
IN SUPREME COURT

ROBERT E. SCHMIDT, Jr.,
RICHARD M. EVANS and
ROBERT L. SABOW, d/b/a
BROWN DEER DEVELOPMENT COMPANY,
Plaintiffs-Respondents,

vs. No. 77-290

RUSSELL J. BEHLING and
BEHLING'S TRANSFER, INC.,
Defendants-Appellants.

MOTION AND MEMORANDUM OF DEFENDANTS REQUESTING PUBLICATION AND CHALLENGING THE FILING OF THE OPINION OF APRIL 1, 1980 AS AN UNPUBLISHED OPINION

NOW COME the defendants-appellants, RUSSELL J. BEHLING and BEHLING'S TRANSFER, INC., by their attorney, ROBERT E. SUTTON, and respectfully moves the Honorable Supreme Court for the entry of an order directing that the opinion filed April 1, 1980 be published for the following reasons:

1. That under the criteria for publication of opinions set forth in Rule 809.23, Wis. Stats. for the Court of Appeals—which by implication should apply to opinions filed by the Supreme Court—the opinion with respect to the

issues decided in Sections I, II and III enunciates and clarifies new rules of law or at the least applies established rules of law to a factual situation significantly different from any found in prior published opinions and contains an interpretation and application of Chapter 299 and Section 704.17, Wis. Stats. which should be of substantial public interest. In addition, the opinion makes a significant distinction concerning a prior decision—*Tower Building Co.* v. *Andrew* (1926) 191 Wis. 269, 210 N.W. 842. And finally, Section II of the opinion appears to be an initial interpretation of waiver of trial by jury under Chapter 299.

2. It is respectfully submitted that failure to publish the opinion is a violation of the rights of the defendants under the Fourteenth Amendment to the Constitution of the United States. An essential concomitant of due process of law as it relates to meaningful access to the courts and appeal is a resolution of issues raised in such a manner as to instill confidence of the litigants in the integrity of the legal process. One of the methods of maintaining faith in this integrity is that the decisions reached by the appellate tribunals shall be subject to scrutiny within the process and utilized as precedent in subsequent cases. With the enactment of a rule which prevents such scrutiny and declares an opinion to be of no precedential value a fundamental value served by the appellate process is undermined.

As Justice Black stated *In re Murchison* (1955) 349 U.S. 1:

> ". . . to perform its high function in the best way justice must satisfy the appearance of justice."

Cf. *Boddie* v. *Connecticut* (1971) 401 U.S. 371 and *Sniadach* v. *Family Finance Corp.* (1969) 395 U.S. 337.

The concept of due process is not merely a procedural safeguard, it affords freedom from arbitrary action. It has been said that the protection from arbitrary action is the essence of substantive due process. *Poe* v. *Ullman* (1961) 367 U.S. 497, 6 L.Ed. 2d 989, 81 S.Ct. 1752 and 16 *Am. Jur. 2d Const. Law,* Chapter 550, pp. 946-949, Chapter 575, p. 980.

It is respectfully submitted that the unpublished opinion by its very nature invites arbitrary action. The general practice and Rule 809.23 should be struck down as unconstitutional on its face and as applied to the instant case.

Dated at Milwaukee, Wisconsin, April 21, 1980.

Respectfully submitted,

ROBERT E. SUTTON
Attorney for Defendants-Appellants

APPENDIX D

STATE OF WISCONSIN
IN SUPREME COURT

ROBERT E. SCHMIDT, Jr.,
RICHARD M. EVANS and
ROBERT L. SABOW, d/b/a
BROWN DEER DEVELOPMENT COMPANY,

Plaintiffs-Respondents,

vs. No. 77-290

RUSSELL J. BEHLING and
BEHLING'S TRANSFER, INC.,

Defendants-Appellants.

MOTION FOR RECONSIDERATION

NOW COME the defendants-appellants, RUSSELL J. BEHLING and BEHLING'S TRANSFER, INC., by their attorney, ROBERT E. SUTTON, pursuant to Rules 809.64 and 809.14, Wis. Stats. and moves the Honorable Supreme Court for reconsideration of the decision filed April 1, 1980 for the following reason:

1. Section II of the opinion—wherein the Court held that trial by jury had been waived by the defendants for noncompliance with the provisions of Section 299, Wis. Stats.—did not analyze, discuss or consider the fact that

the defendants presented uncontradicted evidence to the trial court *before trial* which established that the defendants had requested their initial attorney to make a demand for trial by a jury within the statutory period. His failure to make such demand was a cause of the retention of other counsel. (Record pp. 78-86)

On the issue of right to jury trial the opinion is also silent concerning Section 805.01, Wis. Stats. and the application vel non of the holding of *Krueger* v. *State* (1978) 82 Wis. 2d 272.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the opinion should be reconsidered and reversed on the grounds that under the circumstances the federal and state constitutional rights of the defendants were violated by the trial court holding that the defendants jury trial right had been waived.

Dated at Milwaukee, Wisconsin, April 21, 1980.

Respectfully submitted,

ROBERT E. SUTTON
Attorney for Defendants-Appellants